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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 684

**PROPOSED RULEMAKING AND ADOPTION OF INTERIM RULES REGARDING
SOLID WASTE RAIL TRANSFER FACILITIES**

**COMMENTS OF THE NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE NEW
JERSEY MEADOWLANDS COMMISSION**

The New Jersey Department of Environmental Protection ("NJDEP") and the New Jersey Meadowlands Commission ("NJMC"), collectively referred to as "New Jersey" submit these comments to the Surface Transportation Board ("Board") in the above captioned Rulemaking ("NPR") initiated by the Surface Transportation Board ("Board") pursuant to the Clean Railroads Act of 2008, Pub L No 110-432, 122 Stat 4848 ("Clean Railroads Act" or "CRA"). The CRA amends 49 U.S.C. § 10501 to provide specifically that states have jurisdiction to regulate solid waste rail transfer facilities (also referred to as "facility" or "facilities"), 49 U.S.C. §§ 10501(c)(2), 10908(a), 10908(b), and limits the Board's authority to the issuance of land use exemption permits, 49 U.S.C. §§ 10908(b)(2)(B) and 10909(a). The CRA requires the Board to establish procedural rules for the submission and review of land use exemption permit applications. Id. § 10909(b). The Board has solicited comments on both the proposed rules and on its interpretation of the CRA. New Jersey submits the following comments on the proposed rules and the Board's interpretation of the CRA.

I. THE BOARD'S INTERPRETATION OF THE CRA AND THE LAND USE EXEMPTION PERMIT.

A. The Board's general statements regarding broad preemption are overstated, confusing and unnecessary for this rulemaking.

The NPR includes several statements of broad preemption that are overstated and unnecessary for this rulemaking. For example, the Board stated that if the facility is excluded from the CRA's definition, the facility or portion thereof "would be subject to the Board's general jurisdiction over rail transportation and entitled to preemption from most state and local laws, including siting laws, under section 10501(b)." (NPR at 5, citing Green Mountain RR v. Vermont, 404 F 3d 638, 641-43 (2d Cir. 2005)). This broad statement regarding preemption independent of the factual context could cause mischief in other proceedings, because, for example, a party claiming preemption may cite or quote this statement, which was made without reference to any particular factual context. While courts and the STB have found federal preemption of State police powers in certain limited instances, describing the preemption found in terms of "preemption from most state and local laws" is overstated and confusing.

Proposed 1155.27(b)(4), Standard for review, states that "A land-use-exemption permit will not exempt a state requirement that a rail carrier comply with an environmental, public health, or public safety standard that falls under the traditional police powers of the state unless the requirement is unreasonably burdensome to interstate commerce or discriminates against rail carriers." This provision appears to blur the distinction between a land use exemption from State siting requirements under Section 10909 of the CRA and a claim for preemption from State non-siting requirements. It is also inconsistent with proposed section 1155.27(b)(5), which makes clear that a land use exemption applies only to State requirements affecting the siting of a solid

waste rail transfer facility. Whether State non-siting requirements are burdensome on interstate commerce or discriminatory against rail carriers does not appear in the Standard for Review section of the CRA, 10909(c), and indeed, does not appear to set forth a standard of review for an application for a rail carrier exemption from State siting requirements. The proposed rule is therefore confusing and inconsistent with Section 10908 of the CRA, which authorizes a Board-issued land exemption permit only for siting laws, and requires rail carrier solid waste facilities to comply with all applicable Federal and State environmental, public health and safety, and solid waste requirements, among other things. Proposed §1155 27(b)(4) should not be included in the final rule.

B. Authority to continue to operate while the land use exemption permit application is pending.

The CRA requires solid waste rail transfer facilities to comply with *all* applicable Federal and State environmental, public health and safety laws, including solid waste laws, to the same extent required of any similar solid waste management facility that is not owned or operated on behalf of a rail carrier. Although facilities existing as of the CRA's date of enactment ("existing facilities") are not required to possess a siting permit, the State may petition the Board to require an existing facility to apply for and obtain a land use exemption permit. Id. § 10908(b). The Board is additionally authorized to issue a land use exemption permit for a facility if the Board finds that the State law "affecting the siting of such facility" unreasonably burdens interstate transportation of solid waste by railroad, discriminates against the railroad transportation of solid waste and a solid waste rail transfer facility, or a rail carrier that owns or operates the facility petitions the Board for an exemption. Id. § 10909(a).

The Board however suggests that the CRA "allow[s] an existing facility that is the subject of a state petition to continue its operations until a final decision on the land-use-exemption-permit petition is made by the Board " (NPR at 10 (citing 49 U S C 10908(b)(2)(B), 10909(e)). This broad statement appears to be inconsistent with the more limited language of the CRA. Specifically, the CRA states is that "No State may enforce a law, regulation, order, or other requirement affecting the siting" of an existing facility until the Board has made a final decision on the permit application. The CRA therefore does not broadly authorize continued operation of an existing facility pending the permit application, but simply prohibits the State from enforcing the specifically mentioned siting requirements. The CRA does not immunize an existing facility from State enforcement of non-siting requirements. For example, if the facility violates environmental or health and safety standards, fails to comply with Section 10908(b), or otherwise violates State laws with which Section 10908(a) specifically requires solid waste transfer facilities to comply, then the State is authorized to take appropriate action against the non-compliant facility. The Board should clarify that the scope of a facility's authority to operate pending the land use permit application is limited only to siting requirements.

A related concern is that by identifying laws allegedly affecting siting in its land use exemption permit application, the applicant will then claim that the State cannot enforce any of the identified laws, regardless of whether those laws are properly within the Board's jurisdiction. The effect would be confusion, possible undermining of the State's authority and jurisdiction, impeding of the State's enforcement efforts, and possible harm to the environment and public health and safety. The Board should therefore clarify that mere identification of alleged laws affecting siting in a land use exemption permit application does not bar the State's enforcement of such provision in a non-siting proceeding.

The Board should also amend its statement that if the Board denies a land use exemption permit, the facility must obtain the necessary siting permits to be allowed to operate (NPR at 13) to clarify that the facility must also comply with all other State law as authorized by the CRA

C. Definition of "State laws, regulations, orders, or other requirements affecting the siting of a facility."

The Board proposes to define "State laws, regulations, orders, or other requirements affecting the siting of a facility" as "requirements of a state or a political subdivision of a state, including a locality or municipality, affecting the siting of a facility." The Board also suggests that certain environmental laws may be considered laws "affecting siting." (NPR at 7 and n 7) Under the Board's position, laws "affecting siting" could arguably encompass any State requirement having some indirect or attenuated effect on siting. The CRA requires solid waste rail transfer facilities to comply with "all" State environmental, public health and safety, including solid waste, laws and requirements to the same extent required for non-rail solid waste management facilities. 42 U S C § 10908(a). Given the CRA's express language, New Jersey urges the Board to tighten its definition to prevent facilities from undermining the States' authority over these facilities by claiming that environmental, public health and public safety laws "affect siting "

Similarly, where the State permitting process allegedly subsumes a "siting" determination, the Board should allow the State to make a determination first. This would create greater certainty for state regulators, the industry, and the Board. The solid waste permitting process typically requires consideration of a number of factors, including the proposed capacity (how much waste will be handled at the facility), type of waste, traffic patterns, impact on air, land and water resources due to air emissions, storm water run-off, and wastewater. The

proposed operation, including the type of waste, and design and engineering of the facility all are considered in light of the proposed location and the presence of sensitive environmental resources. The State, not the Board, is authorized to regulate the facility as to these factors and other State laws that pertain to all solid waste facilities. The integrity of the State process should be maintained and not compromised by an applicant's attempt to obtain premature intervention by the Board in State permitting processes contrary to the CRA's clear intent to leave the authority for and jurisdiction of such determinations with the States.

II. THE PROCESS AND SUBSTANCE OF THE LAND USE EXEMPTION PERMIT.

A. Applicants seeking a land use exemption permit.

Section 10909(a) of the CRA authorizes the Board to "issue a land use exemption for a solid waste rail transfer facility that is or is proposed to be operated by or on behalf of a rail carrier." 10909(a)(1). Because the CRA contemplates the issuance of a land use exemption only for facilities operated by or on behalf of a rail carrier, the rail carrier is the proper applicant for a land use exemption permit whether or not the facility is owned and/or operated directly by the railroad or operated on its behalf by a third party. In other words, if a third party operates the facility "on behalf of a rail carrier," the rail carrier itself – and not the third party – should be the only party eligible to petition the Board for an exemption.

The Board's proposed procedure, however, fails to make this distinction, instead allowing "[a]n applicant (i.e., a solid waste rail transfer facility, or the rail carrier that owns or operates the facility)" to seek a land use exemption. This broadening of the exemption process is inconsistent with the CRA and indeed, exceeds the Board's authority that the CRA granted. The Board should therefore clarify that the applicant for a land use exemption must be the rail carrier that owns or operates the facility. The Board should also require all applications to identify all

parties having an interest in the exemption and the facility. As the Board is aware, waste operators and railroads sought to exploit the preemption provision of Section 10501 to evade State laws, numerous litigations and Board proceedings resulted, which in turn ultimately led to the CRA. For example, in the Town of Babylon decision, the Board found that the facility at issue was not "transportation by rail carrier." Town of Babylon and Pinelawn Cemetery--Petition for Declaratory Order, STB Finance Docket No. 35057 (served March 11, 2008); see also See, e.g., J.P. Rail, Inc. v. New Jersey Pinelands Comm'n, 404 F. Supp. 2d 636 (D.N.J. 2005), Hi Tech Trans. LLC v. State of New Jersey, 382 F.3d 295 (3d Cir. 2004). The CRA, however, cannot be assumed to have eliminated the problem of railroads and waste operators claiming limited State authority over their operations.

To minimize the problem, the Board should tighten the application procedures by requiring all applicants to identify with supporting documentation the actual "on the ground" operator of the facility, the operator's experience in the waste and rail industries, the contractual relationship between the rail carrier and the third party operator, and other information the Board believes will assist in evaluating the legitimacy and genuineness of the relationship. The Board should also require the applicant to certify to the accuracy of the information.

- B. An applicant should not be allowed to seek and obtain a land use exemption permit for future growth because of the impossibility of accurately predicting future circumstances.**

The Board proposes to require that a facility describe in its application those areas of the property that it has set aside for future growth. (NPR at 5). New Jersey supports this requirement, which will ensure full disclosure by the facility of its plans for the property. New Jersey, however, does not believe that the Board should include in a land use exemption permit, without limit, permission to expand into those areas where expansion may occur. To give

blanket exemption without limits or conditions ignores the possibility that a change in circumstances may make future expansion of the facility no longer acceptable under the criteria of the CRA. In such cases, the applicant or facility, not the State, should have the burden of showing why the expansion is necessary and that the expansion will not result in unreasonably risks to the public health and environment. Moreover, an application procedure that allows for future expansion without a further demonstration that public health and safety would be protected under then current conditions could undermine the efficacy of the evaluation of applications for land use exemptions. Applicants would be encouraged to submit "lowball" applications for limited operations, and then expand their operations without further review after a land use exemption has been issued.

Therefore, New Jersey suggests eliminating the option of a land use exemption permit for future growth, or establishing certain limits and conditions if future growth is permitted. Such limits and conditions can include time limits, e.g., the exemption will expire in five years, and specific conditions, e.g., exemption is only valid if the State laws regarding siting have not changed at the time the expansion occurs and the expansion contemplates the same type of waste handled at the same amount, because different types of waste require different handling and raise different concerns.

If the Board proposes to grant a permit for "reasonable future expansion," see proposed 115.22(a)(17), then the Board should specifically require the applicant to justify its request, and the Board should impose the same standards for review for the facility's proposed proposed expanded operations. The proposed rules currently do not make clear that the proposed expansion is also subject to the standards for review under 115.27, or that the application must address the proposed expansion to the same extent as the currently proposed facility. Similarly,

1155 22(b) should make clear that the applicant must explain why the Board should grant a permit for the proposed "reasonable future expansion."

C. Requirements for an application when filing after an unsatisfactory result from a State, local or municipal authority affecting the siting of the facility.

The terms "unsatisfactory result" and "permission" as used in proposed §1155 23 are vague and ambiguous and open the door to potential abuse, frivolous applications, and the undermining of the State's authority to regulate solid waste. If an applicant, for example, receives a State permit to handle solid waste at a capacity less than what the applicant sought, this provision arguably allows the applicant to seek a permit because of the perceived "unsatisfactory result." The applicant would be able to claim that the permit "affects the siting" and "unreasonably burdens or discriminates against the railroad," and the State would be forced to expend resources to defend an action under authority expressly granted by the CRA to the State. The term "unsatisfactory result" therefore should be clarified as applying only to decisions on siting only, without implicating broader State permitting and other regulatory authority and jurisdiction.

Similarly, the Board should clarify that the "permission" referenced in §1155 23 is not the State's permitting and other authority that the CRA makes clear is within the State's purview. The Board's proposal could allow a facility to broadly claim that the State or relevant authority has applied a law, regulation or other requirement that "affect[s] the siting of the facility" (NPR at 8, proposed 1155 23). To avoid opening the door to allow applicants to challenge the very permitting actions that the CRA expressly left for the States, the Board should make clear that the "permission" sought is for siting only, without implicating broader State permitting and other regulatory authority and jurisdiction. Without this clarification, a facility is potentially allowed

to undermine the State's authority by applying to the Board for a land use exemption permit simply because the facility disagrees with State conditions or requirements arising out of the State's laws that are not siting laws but are laws with which the CRA expressly requires the facility to comply. 42 U S C. § 10908(a)

Finally, to ensure that this process is not abused, as the notice of exemption process was abused for so many years, New Jersey urges the Board to expressly state in its rules that the Board shall deny a petition if the Board determines that the applicant is seeking a land use exemption permit to circumvent the State's laws with which the CRA requires the facility to comply. This type of affirmative statement would reflect the Board's firm commitment to carrying out the CRA's intent and at least discourage facilities from attempting to evade the State's laws and inundate the Board's docket with proceedings that the CRA was intended to eliminate.

D. Certification requirement for Governor or his/her designee.

The CRA authorizes the Governor or his/her designee to petition the Board to initiate a land use exemption proceeding for an existing facility 42 U.S.C. § 10908(b)(2)(B). The Board proposes to require the Governor or his/her designee to certify that the facility meets the CRA's definition of a solid waste rail transfer facility (NPR at 5, 9; proposed 1155 10(e)). The proposed rule is unauthorized by the CRA, because the CRA only exempts existing facilities from having to possess a siting permit unless the Governor petitions the Board to require the facility to apply for a land use exemption permit. 42 U.S.C. § 10908(b)(2)(B)

Moreover, this threshold determination is for the Board, not the Governor, to make. Indeed, proposed 1155.13(b) appears to recognize the Board's responsibility, by stating that "[t]he Board shall accept the Governor's complete petition on a finding that the facility qualifies

as a solid waste transfer facility pursuant to the definition in 49 U.S.C. 10908(c)(1)(H) and 49 CFR 1155.2 on both the filing of the petition and on October 16, 2008 ~ (Emphasis added) Any requirement of a "good faith certification" by the highest official of the State of factual assertions is inappropriate and unnecessary. The Board should therefore eliminate the good faith certification requirement.

Proposed 1155.12(a) should be also revised to allow an interested person to reply to a petition challenging specific facts set forth in the Governor's petition, not the Governor's "classification of the facility as a solid waste rail transfer facility." The Board should also permit a State to petition the Board as part of its Section 10909 petition for the threshold determination of whether a facility falls under the Board's jurisdiction; this issue, as the Board is aware, has been a highly contested and controversial issue over the past decade. See supra, p. 7. While the CRA likely decreased the motivation for a facility to assert it is "transportation by rail carrier," whether the motivation has been eliminated remains to be seen.

III. ADDITIONAL COMMENTS ON PROPOSED RULES

A. Requirement of a "perfected petition"

Proposed 1155.11(b) states that the Board will reject a "substantially incomplete or otherwise defective" petition in an administratively final order. The Board should allow a reasonable opportunity to cure a "defective" petition after the Board notifies the petitioner of the missing information. The Board should also make clear that an administrative final order rejecting the petition is not "with prejudice" and does not preclude petitioner from filing a second petition regarding the same facility.

B. Proposed 1155.20

Proposed 1155 20(a)2(ii) requires an applicant to serve its Notice of Intent upon "[t]he state agency/ies and/or municipal agency/ies that would have permitting or review authority over the solid waste rail transfer facility absent 49 U.S.C. 10908 and 10909, these regulations, and federal preemption under 49 U.S.C. 10501(b)." This rule appears to derive from Section 10909(b)(2), which requires the Board's procedures to address "the opportunity for public notice and comment including notification of the municipality, the State, and any relevant Federal or State regional planning entity in the jurisdiction of which the solid waste rail transfer facility is proposed to be located." The reference to federal preemption in the proposed rule, however, is unnecessarily broad in light of the statutory language, and reaches and assumes a conclusion (federal preemption) without facts or determination. Therefore, the rule should mimic the statutory language.

C. Proposed 1155.20(c)

The Board proposes to require applicants of new facilities to submit an Environmental Report containing the information described at 49 CFR 1105.7 and a historic report, if applicable, under 49 CFR 1105.8. New Jersey believes that consistent with the Board's environmental regulations, the applicant should be required to comply with 49 CFR 1105.9 regarding the Coastal Zone Management Act. The Board has offered no reason to exempt these facilities from that provision.

Also, the Board does not explain why only new facilities are required to comply with these provisions. No valid reason exists to distinguish new and existing facilities regarding the environmental impacts of the facility when the Board must apply the same standard of review for all land use exemption permit applications. Therefore, the Board should not exempt existing facilities from the Environmental and Historic Reports requirement.

Similarly, proposed 1155.22(c) states that the applicant shall certify that it has submitted the "environmental and/or historical report containing the information in 49 CFR 1105.7 and 1105.8, if one is required . . ." The Board should clarify that "if one is required" refers to the historical report under 1105.8.

Finally, solid waste poses particular risks and concerns that should be considered by the Board while reviewing a land use exemption permit application. The Board's NEPA requirements do not address the particular concerns raised by solid waste, but to those raised by classic railroad operations. For example, the threshold requirements regarding air are too high (1105.7(e)(5)). Also, 1105.7(e)(7) only addresses hazardous waste and hazardous materials, and stormwater management is not addressed. The Environmental Report also does not have to consider, for example, state (vs federal) wetlands, endangered or threatened species and areas designated as critical habitat under state law, wildlife management areas, natural areas, or agricultural lands. Therefore, the Board should require applicants to state how the facility will protect against damage to natural resources by, among other things, air and water pollution, and to include supporting documentation for its claims.

D. Waiver of specific regulations

Proposed 1155.24(d)(2) allows an applicant to seek a waiver of specific regulations listed in subpart C by filing a waiver petition with the Board. New Jersey urges the Board to delete this provision, which is vague and ambiguous and can potentially undermine the entire purpose of the land use exemption permit procedure. If the Board chooses to keep this provision, the Board, at a minimum, should specify under what circumstances a waiver may be sought, what provisions the applicant may seek a waiver of, the proof the waiver petitioner must submit in support of its petition, and the standard to be applied in considering a waiver. The Board should

also require public notice of the waiver process with opportunity for public comment prior to any decision

E. Transfer and termination of a land use exemption permit

Proposed 1155.26(a) allows the transfer of a land use exemption permit if the rail line associated with the facility is transferred to another rail carrier or to an entity formed to become a rail carrier pursuant to authority granted by the Board under 49 USC 10901, 10902 or 11323. The Board proposes here to state that an applicant "should" advise the Board of the intended transfer when seeking Board authority under 49 U S C 10901, 10902, or 11323. The Board should require, not suggest, the applicant to notify of the intended transfer when seeking Board authority. The Board should also require public notice of any transferred permit.

IV. CONCLUSION

New Jersey requests that the Board modify the proposed rules to exercise its authority consistent with the Clean Railroads Act and in light of the foregoing comments.

Respectfully submitted,

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